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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-730

HAROLD REED HOKE, M.D.,
Respondent,

v.

RETAIL CREDIT CORPORATION,
GEORGE JACKINS and FRANK GARRIS,
Petitioners.

To the United States Court of Appeals
Fourth Circuit

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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The statement of the Petitioner set out under the headings *Opinions Below, Jurisdiction, Questions Presented, Statute Involved,* and *Statement of the Case* is not contested by the Respondent except for the Conclusions drawn by the Petitioners as to error committed by the Court of Appeals.

ARGUMENT IN CONTRA TO THE PETITIONER'S REASONS FOR GRANTING THE WRIT

A. Synopsis of the Respondent's Position:

The Petitioner/Company proposes to this Honorable Court that this case "will directly affect the way in which professional licensing boards throughout the country screen applicants for medical, legal and other professional licences". So be it. The holding of the Honorable Fourth Circuit Court of Appeals requires that a consumer reporting agency be held responsible when it does not meet "their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy" as mandated in 15 USCS 1681(a)(4) ". . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy and proper utilization of such information. . ." as required by 15 USCS 1681(b). The decision of the Fourth Circuit Court of Appeals requires that a consumer reporting agency either restrict itself to that information authorized in 15 USCS 1681 f, limiting disclosures to governmental agencies, or, in the alternative, be held to reasonable standards of fairness and equity to the consumer. The Petitioner/Credit Company, in asserting the need for the licensing boards to have access to this material concerning applicants, has overlooked the provision of 15 USCS 1681b(2) allowing the information to be provided by the permission of the individual. No licensing board is going to be hard pressed if they but include in their application forms a phrase allowing the release of consumer reporting agency information.

The Petitioner/Credit Company further complains that the Fourth Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings. The Petitioner/Credit Company takes issue with the Court of Appeals' interpretation of the language of the FCRA. The respondent would respectfully argue to this Honorable Court that the Court of Appeals has understood quite fully the Congressional intent of the FCRA and the sure syntax of the English language to express this intent.

B. Respondent's Argument in Contra to the Petitioner's View That:

The Determination of the Court of Appeals that the Report in Question was Intended for Use in "Employment Purposes" is contrary to the Plain Language of FCRA as well as the Spirit and Intent of the FCRA.

Section 1681(h) defines "employment purposes";

> The term "employment purposes", when used in connection with a consumer report, means a report used for the purpose of a consumer for employment, promotion, reassignment or retention as an employee.

Petitioner argues that not to read this section as meaning "employment as an employee, Promotion as an employee, reassignment as an employee and retention as an employee" is a departure from accepted norms of English usage. Respondent, however, would argue that it would be this tautology that would fly in the face of accepted, correct usage of the English Language.

Webster's New 20th Century Dictionary, unabridged, 2d Edition defines:

> *employment:* (1) The act of employing or the state of being employed. (2) Work; occupation; business; that at which one is employed; as agricultural employments, mechanical employments.

promotion: (1) A promoting; furtherance. (2) the result of promoting; advancement. (3) the stirring up of interest in an enterprise.

reassignment: The act of reassigning. *Assign:* (1) to allot; to appoint or grant by distribution or apportionment; also, to give out as a task. (2) To designate or appoint for a particular purpose, duty, etc. (3) to fix, specify, or designate; as, to assign a day for a judicial hearing. (4) In law, to transfer or make over to another, as an estate; in bankruptcy, to transfer (property) to, and vest in certain persons, called assignees, for the benefit of creditors. (5) to ascribe; refer to; as to assign a reason for one's conduct.

retention: (1) the act of retaining or keeping; the state of being retained. (2) The power of or capacity for retaining. (3) (a) a remembering; the faculty of the mind by which it retains ideas; memory; (b) ability to remember. (4) In medicine, a morbid accumulation of solid or liquid matter in vessels of the body or cavities intended to contain it only for a time. (5) The act withholding; reserve; restraint. (Obs.) (6) The state of being confined; custody; confinement. (Obs.) (7) In Scots Law, a lien; a right of withholding a debt or retaining property until a debt due to the person claiming this right is paid.

The above dictionary definitions of the words employment, promotion, reassignment and retention demonstrate concretely that only "retention" needs the modifier "as an employee", and the Court of Appeals is most correct in its understanding of the Act and the English language when it states:

> The words "employment, promotion [and] reassignment," having specific meanings in the area of activities for the production of income, need no modifier. By contrast, "retention," a word of varied meanings in varied contexts, does. Hence, we conclude that the statutory and generic definitions of the operative words are congruent and that furnishing information in the present circumstances brought Retail Credit under the terms of FCRA. *Hoke* vs. *Retail Credit Corp.,* 521 F.2d 1079, 1082.

The Petitioner/Credit Company argues to this Honorable Court that the construction placed on the wording "employment purposes" is contrary to the spirit and intent of FCRA.

The Congressional intent is stated clearly at § 1681(b);

> It is the *purpose* of this title to *require* that consumer reporting agencies *adopt reasonable procedures* for meeting the needs of commerce for consumer credit, *personnel,* insurance, and *other information* in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy and proper utilization of such information in accordance with the requirements of this title. (emphasis added).

The choice of the word *personnel* by Congress gives insight to the spirit and intent of FCRA. While later defining "business purposes" and speaking of employment, we understand that this is in the context of its stated *purpose* at § 1681(b).

Webster's defines personnel:

> *Personnel:* persons employed in any work, enterprise, service establishment, etc.

And, at § 1681a(c) Congress defines consumer:

> The term "consumer" means an individual.

That is to say the Congressional spirit and intent is to protect *individuals* by requiring *reasonable procedures* by credit reporting agencies in matters of *personnel* and *other information.* The respondent, a physician, is an individual, forms part of the personnel constituting the medical profession, about whom a consumer reporting agency provided information, be it personnel information or "other information".

Petitioner/Credit Company cites in its petition three cases to indicate that it is the objective of the person to whom the report is provided that activates FCRA. (*Fernandez* v. *Retail Credit Co.,* 349 F.Supp. 652 (E.D.La. 1972); *Sizemore* v. *Bambi Leasing Corp.,* 360 F.Supp. 252 (N.D.Ga. 1973); and *Wrigley* v. *Dun and Bradstreet, Inc.,* 375 F.Supp. 969 (N.D.Ga. 1974), aff'd. without opinion 500 F.2d 1183 (5th Cir. 1974).) Respondent would argue that these cases have no bearing on the issue before this Honorable Court. *Fernandez* deals with the purchase of commercial or business insurance *by a corporation* and clearly not covered in the limitation of § 1681a(d)1 which speaks of the consumer's, i.e. an individual's eligibility for ". . . insurance to be used primarily for personal, family or household purposes,"

Section 1681b(3)(E) is one of the five other "permissible purposes" for which a consumer reporting agency may furnish a consumer report. Assuming arguendo, it is the need of the person to whom the report is furnished that activates FCRA, as asserted by the Petitioner; then the position of the Petitioner/Credit Company is most inconsistent.

The pertinent parts of this section read:

> 1681b. Permissible purposes of reports.—A consumer reporting agency *may* furnish a consumer report under the following circumstances and *no other:*
>
> (1) .....
>
> (2) .....
>
> (3) To a person which it has *reason to believe*—
>
> (A) .....
>
> (B) .....
>
> (C) .....
>
> (D) .....
>
> (E) otherwise, has a legitimate business need for the information in connection with business transaction involving the consumer. (emphasis added)

The Petitioner/Credit Company has either *reason to believe* that there exists a legitimate business need on the part of the Medical Board for the information, therefore the report is a "consumer report" or has provided the information in rank contempt of the Congressional instruction prohibiting the passing of the information. The Petitioner/Credit Company argues that the report is a non-consumer report, therefore non-covered by the FCRA because the Credit Company furnished a report specifically precluded by § 1681b, then asks the Courts to dismiss the Plaintiff/Respondent's action on the grounds that by violating the clear enjoinder of Congress, the Defendant/Petitioner does not fall within the ambit of FCRA.

In the other two cases cited by the Petitioner, *Sizemore* and *Wrigley,* the Respondent does not find any reference to § 1681b(3)(E). Both cases concern commercial credit for a company, not an individual, i.e.,

a consumer as defined by § 1681a(c). *Sizemore* concerned the lease of a vehicle by a company and *Wrigley* dealt with a credit report on a construction company for commercial credit. These cases are highly distinguishable from the case *sub judice* involving a report on an individual seeking a license from a governmental instrumentality.

The Petitioner argues that the "meeting the needs of commerce" phrase in the Congressional purpose excludes this case from the ambit of FCRA. To read the statement of Congressional purpose, purely a response to the needs of commerce, is to obviate the remainder of the language of the stated purpose employing such phrases as "require . . . consumer reporting agencies adopt reasonable procedures . . . for . . . personnel, . . . and other information in a manner which is fair and equitable to the consumer, with regard to the . . . accuracy . . . and proper utilization of such information. . . . The Petitioner/Credit Company cites as authority *Porter* v. *Talbot Perkins Children's Services,* 355 F.Supp. 174 (S.D.N.Y. 1973). In *Porter,* a potential adopting parent complained of the accuracy of information in the possession of an adoption service. The FCRA's purpose is to require certain standards of "consumer reporting agencies", defined at § 1681a(f):

> The term "consumer reporting agency" means any person which, for monetary fees, dues, or on cooperative nonprofit basis regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to *third parties,* and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. (emphasis added)

An adoption agency is not in the business of collecting information for third parties and clearly is a vastly separate and distinct function from a consumer reporting agency operating in interstate commerce. An adoption agency is "far removed from the commercial world". The Court in *Porter* points out that the FCRA ". . . is designed to check informational abuses in the commercial arena." The Respondent respectfully submits to this Honorable Court that the informational abuses in the commercial arena occupied by consumer reporting agencies using the facilities of interstate commerce are in need of checking, and that the Congressional check imposed by FCRA is necessary "to meet the needs of commerce" as stated in the Congressional purpose at § 1681(b).

The Petitioner/Credit Company argues that the Texas Board is an entity "whose function is far removed from the commercial world". The Respondent would argue that the fees charged by consumer credit reporting agencies to licensing boards nation-wide for reports are not far removed from the commercial world, nor the activities of the consumer reporting agencies which provide such licensing boards with information are engendered by some eleemosynary motive. Medicine as "learned profession" is not compatible with every aspect of a commercial enterprise. Medicine, like law, cannot be denied to play an important part in commercial intercourse. (*Goldfarb* v. *Virginia State Bar,* 95 S.Ct. 2004 (1975). To assert that the licensing of medical practitioners is far removed from the commercial arena is to repose an unwarranted confidence in the altruism in the medical profession.

C. Respondent's Argument in Contra to the Petitioner's View That:

The Holding of the Court of Appeals that § 1681a (d)(3) of the FCRA Incorporates only the "General Subject Matter (But Not All Specific Detail) of § 1681b(3)(D)" Contravenes the Plain Language of the FCRA.

Section 1681a(d) and 1681b(3)(D) state, in part:

> The term "consumer report" means any . . . communication . . . by consumer reporting agency bearing on a consumer's . . . character, general reputation . . . which is used *or expected to be used* . . . for . . .
>
> (1) . . . .
>
> (2) . . . .
>
> (3) other purposes authorized under section 604 [1681b of this title].

1681b. Permissible purposes of reports.—A consumer reporting agency may furnish a consumer report under the following circumstances and *no other:*

> (1) . . . .
>
> (2) . . . .
>
> (3) To a person which it has reason to believe—
>
> (A) . . . .
>
> (B) . . . .
>
> (C) . . . .
>
> (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
>
> (E) . . . .

Petitioner/Credit Company argues that the Court of Appeals has put a fugitive period after the word "instrumentality" and thus rendered the following words "required by law to consider an applicant's financial responsibility" as some grotesque Congressional pleonasm. The Court of Appeals on hearing below stated:

> Translated to the facts of this case, § 1681a(d)(3) may be read to mean that the furnishing of information about an individual to serve as a factor for a determination of plaintiff's eligibility for license to practice medicine renders the report a "consumer report," irrespective of the actual authority of the Texas licensing board to consider financial responsibility or status, or Retail Credit's reasonable belief as to the board's authority.

If the Court of Appeals has added any periods, fugitive or otherwise, it would occur after the word "license", thus causing § 1681b(3)(D) to read:

> intends to use the information in connection with a determination of the consumer's eligibility for a license, *or*
>
> intends to use the information in connection with a determination of the consumer's eligibility for a[n] other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status.

It is the contention of the Respondent that this second interpretation is the Congressional intent and that the Court of Appeals has correctly seen it so. It is a "consumer report" if given to a government instru-

mentality, and thus permissible under FCRA, when transmitted for a license or transmitted for some benefit [e.g. home mortgage, franchise to operate a business on a government reservation to qualify for a Small Business Administration loan] which would require a financial verification. Given this reading of the FCRA, § 1681f, which limits information to government agencies, is now clear and congruent with the rest of the FCRA.

When a consumer (individual) deals with the Government for a license or he negotiates some financial arrangement with a government agency, the government may request a "consumer report" and it may be lawfully provided under the terms of FCRA. However FCRA does not permit the government to invade the files of every reporting agency at the government's whim and caprice, since § 1681f allows:

> Notwithstanding the provisions of § 1681b, a consumer reporting agency may furnish identifying information respecting any consumer, *limited to* his name, address, former addresses, places of employment or former places of employment, to a governmental agency .

The Petitioner/Credit Company must then argue that, since it presented a non-consumer report to a governmental instrumentality, the report is non-covered by the FCRA; therefore the Petitioner/Credit Company may empty its files to any government agency, with absolute impunity and in Pecksniffian disdain of the § 1681f, since § 1681f is non-law concerning a non-report which is non-covered. The Petitioner/Credit Company has questioned the Court of Appeals *sua sponte* determination of what the FCRA *should* say and complains that the Court's interpretation "departs from the accepted and usual course of judicial proceedings".

Section 1681f has been interpreted to prohibit the government's use of consumer reporting agency files at will.

> The clear implication from this Section [1681f] is that the Act is applicable to *all government agencies*, including the Internal Revenue Service, and to the extent that a government agency seeks a consumer report in the hands of a consumer reporting agency, it must obtain a Court order therefor pursuant Section 1681b of the Act or otherwise comply with such Section. *United States* vs *Puntieri*, 379 F.Supp. 332, 334 (D. N.Y. 1974)

The Petitioner/Credit Company would argue that if the information is not for purposes authorized in § 1681a(d) or § 1681b, there is not "consumer report"; therefore the Act does not apply. This though contravenes plain English, the Senate Committee Report and judicial interpretation.

> There can be little doubt that government agencies in general are held to the provisions of section 604 [1681b]. This is evidenced by section 608 [1681f] of the Act, quoted above, which allows a consumer reporting agency to furnish a governmental agency with identifying information concerning a consumer. But the type and amount of information which may thus be furnished to government agencies notwithstanding section 604 [1681b] makes it clear that section 604 [1681b] was intended to apply to government agencies as well as others seeking consumer reports.
>
> Moreover, the legislative history of Fair Credit Reporting Act indicates that Congress clearly intended that no government agency should receive

a consumer report other than pursuant to the provisions of section 604 [1681b]. The Senate Committee Report on S. 823, as passed by the Senate on November 6 1969, reflects an intent and concern that consumers be secure against unlimited governmental acquisition of personal information about them. The Report explained the interrelationship of section 604 [1681b] and section 608 [1681f] as follows:

> "Section 608 [1681f]—Disclosure to Governmental Agencies—The disclosure of information to governmental agencies is limited to identifying type information . . . unless the governmental agency has obtained a Court order or is a bona fide creditor, insurer, employer or licensor." *F.T.C.* v. *Manager, Retail Credit Co., Miami Branch Office,* 357 F. Supp. 347, 352 (1973).

In the case of *F.T.C.* v. *Manager, Retail Credit Co., supra,* the Petitioner/Credit Company successfully resisted a request for consumer reports by the Federal Trade Commission on the grounds that the Petitioner/Credit Company was not authorized by § 1681b to release consumer reports. (*F.T.C.* v. *Manager, Retail Credit Co., supra.*, at 349) A position then, most inconsistent with the present assertion that such activity is, now, not within the ambit of the FCRA. While asking this Honorable Court to supervise the Court of Appeal's interpretation, the Petitioner simultaneously asks that § 1681f be read to non-exist so there will be non-coverage by FCRA of the non-credit submitted to the Texas Board thus rendering the Petitioner non-required to meet the "grave responsibilities" imposed by FCRA on all credit reporting agencies.

D. In the Syntax of the FCRA, "Consumer" and "Individual" Are Synonymous: It Is the Individual That Congress Intended To Protect.

The Petitioner "strain[s] at a gnat, and a swallow[s] camels" (Matthew 23:24) to classify the report on the Respondent-Plaintiff/Physician as other than a consumer report. The FCRA defines a consumer as an individual at § 1681a(c) and defines a "person" at §1681a(b) more expansively to include inter alia corporations, trusts, associations, and governmental agencies. The FCRA and the learning we receive from subsequent judicial interpretations are consistant in demonstrating the central theme of protection of the individual from the abuses of the credit reporting industry.

> The Fair Credit Reporting Act, 15 USCA 1681 et. seq. (FCRA), enacted in 1970 represents the first significant effort to curb some of the abuses of the credit reporting industry. It is has been estimated that credit files are maintained on more than 120 million American consumers. See Hearings on S. 2360 Before the Subcomm. on Consumer Credit, 93d Cong. 1st Sess. 20. This Act is an effort to provide some protection from erroneous or unauthorized distribution of this mass of information. The margin for error is not small, it being believed that as many as one out of every twenty reports may contain material errors. See "Actions For Negligent Noncompliance Under the Federal Credit Reporting Act," 47 S.Cal.L. Rev. 1070, 1090 (1974). The Act has codified certain aspects of the common law doctrines of defamation and imposed certain new requirements. The general purpose of FCRA is to protect the reputation of a consumer, for once false rumors are circulated, there is not complete vindication. See O. Holmes, The Common Law III (M. Howe

ed. 1963). *Ackerley* vs *Credit Bureau of Sheridan, Inc.*, 385 F. Supp. 658, 659 (1974).

The concern of Congress has further pointed out:

> Congress' concern was to protect consumers from the misuse of information acquired by credit reporting agencies. The Act cannot be interpreted as applicable to the activities of credit reporting agencies only when the consumer applies for credit, insurance or employment, leaving them otherwise to continue the very practices the Act was designed to prohibit. The Act would afford little protection for the privacy of a consumer if it only regulated credit reporting agencies of their legitimate business activities but left them free to continue their clandestine activities in other areas.
>
> If a consumer report is only a report made for one of the purposes enumerated in § 1681a(d), then § 1681b(3), restricting the uses to which a consumer report may be put, adds nothing to the Act. In order for § 1681b(3) to be meaningful, "consumer report" must be interpreted to mean any report made by a credit reporting agency of information *that could be used* for one of the purposes enumerated in § 1681a. Only then can § 1681b be given the meaning Congress intended. Section 1681b states the purposes for which such reports legitimately may be used. Its clear implication is that there are some purposes for which consumer reports may not be furnished. *Belshaw* vs *Credit Bureau of Prescott,* 392 F. Supp. 1356, 1359 (1975).

CONCLUSION

The Honorable Fourth Circuit Court of Appeals correctly determined the spirit and intent of the FCRA, its decision being congruent with the decisions of other Courts in the federal system and not requiring the supervision of the Supreme Court of the United States in this case, and the Petition for a Writ of Certiorari should be denied.

Dated: December 29, 1975

Respectfully submitted,

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